Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CAROL LAWRENCE,
Petitioner,

v.

CURATORS OF THE UNIVERSITY OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Prior to *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), the District Court and the Eighth Circuit, respectively, granted and affirmed summary judgment for Respondent on Petitioner's Title VII gender discrimination claim.

Are the lower court opinions consistent with *Reeves*?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered February 19, 2000 is reported at 204 F.3d 807 (8th Cir. 2000) and can also be found at 2000 U.S. App. LEXIS 2354 (8th Cir. 2000). A copy of that Opinion, as well as the Denial of Rehearing en banc, 2000 U.S. App. LEXIS 8821 (8th Cir. May 3, 2000) and the Memorandum Opinion and Judgment of the United States District Court for the Eastern District of Missouri, rendered 1/29/99, 1999 U.S. Dist. LEXIS 21179 (W.D. Mo. 1999) are reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

On February 8, 1999, the District Court entered Final Judgment for the University, an Order from which Carol Lawrence timely appealed. The District Court had jurisdiction pursuant to 28 U.S.C. §1343(4), 42 U.S.C. §2000e-(5) and 29 U.S.C.§626(c). *See* Appendix C. The Judgment of the Eighth Circuit Court of Appeals was entered February 18, 2000. *See* Appendix B. The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. 1291. The Court of Appeals denied Rehearing en banc on May 3, 2000. *See* Appendix C. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury

shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 2000e-2
(Title VII of the Civil Rights Act of 1964)

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. §1981a(c)(1)
(The Civil Rights Act of 1991)

Section 102"(c)Jury Trial. - If a complaining party seeks compensatory or punitive damages under this section -

"(1) any party may demand a trial by jury.

STATEMENT OF THE CASE

This is an appeal from a grant of summary judgment against Petitioner, plaintiff Carol M. Lawrence, on her claim that she was denied promotion and tenure at the University of Missouri, School of Business, because of her gender in violation of Title VII of the Civil Rights Act of 1964. Lawrence filed suit under Title VII and requested a jury trial.

The question before the Court is whether, in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct.

2097, 68 U.S.L.W. 4480 (June 12, 2000), a jury, not a judge, should have resolved the substantive factual disputes. Petitioner requests that this Court grant the Petition for Certiorari, vacate the decisions of the lower courts affirming the grant of Summary Judgment and remand to the Eighth Circuit for reconsideration in light of *Reeves*.

The University conceded Lawrence's prima facie case, offering as its legitimate, non-discriminatory reason the explanation that Lawrence was denied tenure due to the quality of the journals in which she published. Lawrence offered what the dissent characterized as "compelling evidence of pretext"[1] in the form of comparative evidence that the University's standards for promotion and tenure were unequally applied to her as compared to similarly situated males and that the University changed at the "eleventh-hour" the standards for tenure as applied to her. The University's primary reason for denying Lawrence tenure was that she failed to publish in a "top research journal". Lawrence presented evidence that the key decision-makers characterized a journal in which she had published two articles as "second-tier" and "not top quality", while characterizing the **same journal** as one of the "top dozen or so research journals in the accounting field" and "prestigious" in support two years earlier of the tenure application of a comparable male and as a "top research journal" in support of the promotion of the male Chair of the Tenure Committee that turned Lawrence down. The United States District Court for the Western District of Missouri noted that "there are facts in the record that might have justified the conclu-

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[1] See Appendix B, at page A-12.

sion that she had a strong research record," but nevertheless concluded that "there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of the publications in which her work was published." The district court thus granted summary judgment on the issue of pretext.[2] On February 18, 2000, the Eighth Circuit Court of Appeals, affirmed in a per curiam, published opinion. (Judge Theodore McMillian dissenting). Lawrence requested a Rehearing en banc, which the Eighth Circuit denied on May 3, 2000.

REASONS FOR GRANTING THE WRIT

This case presents, in the summary judgment context, the issues addressed in *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000). *Reeves* held that lower courts err by failing to credit the employee's prima facie case and evidence challenging the employer's "legitimate, nondiscriminatory reasons" in determining, as a matter of law, that the employee failed to prove Title VII discrimination. *Reeves,* 68 U.S.L.W. at 4484. Lower courts further err by crediting the employer's self-serving testimony, when such testimony is impeached or contradicted, by failing to draw all reasonable factual inferences in favor of the employee and by impermissibly substituting the courts' judgment concerning the weight of the evidence for the jury's. *Reeves,* 68 U.S.L.W. at 4484. Finally, the Court made clear in *Reeves* that a prima facie case, combined with sufficient evidence that the employer's asserted justification is false, is normally enough to get to a jury, absent a record that:

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[2] See Appendix C, at page A-33-34.

> conclusively reveals some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Reeves, at 68 U.S.L.W. at 4483.

In this case, the District Court and the Eighth Circuit, acting prior to *Reeves*[3] - — applied the very mistaken

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[3] *Since Reeves* was handed down, the Eighth Circuit has given the case scant recognition. As of July 21, 2000, this Circuit has ruled on forty-one summary judgment appeals involving employment discrimination cases. (*See Tokuhoshi v. Tension Envelope*, No. 99-1742 (8th Cir. June 12, 2000); *Kennell v. Gates*, No. 99-1931 (8th Cir. June 14, 2000); *Jackson v. UPS*, No. 99- 2591 (8th Cir. June 14, 2000); *Armstrong v. Todd Mandell Assoc.*, No. 00-1470 (8th Cir June 15, 2000); *Norbeck v. Basin Electric Power*, No. 99-2205, 99-2403 (8th Cir. June 15, 2000); *Henderson v. Simmons Foods, Inc.*, No. 99-1914 (8th Cir. June 16, 2000); *Doumouras v. NW Airline, Inc.*, No. 99-3189 (8th Cir. June 20, 2000); *Hocevar v. Purdue Frederick Co.*, No. 98- 4075 (8th Cir. June 22, 2000); *Stewart v. Pafford Ambulance*, No. 99-2993 (8th Cir. June 22, 2000); *Phillips v. Union Pacific RR*, No. 99-1775 (8th Cir. June 26, 2000); *Stuart v. General Motors Corp.*, No. 99-2769 (8th Cir. June 26, 2000); *Buettner v. Arch Coal Sales Co.*, No. 99- 3348 (8th Cir. June 26, 2000); *Wall III v. Noel*, No. 00-1152 (8th Cir. June 29, 2000); *Horse v. Waterbury*, No. 99-1165 (8th Cir. June 29, 2000); *Crayton v. Cardinal Building*, No. 99-2650 (8th Cir. June 29, 2000); *Simat v. Chi-Chi's Inc.*, No. 99-2805 (8th Cir. June 29, 2000); *Friedman v. City of Jacksonville*, No. 99-3662 (8th Cir. June 29, 2000); *Walker, Jr. v. AR State Hospital*, No. 99-4001 (8th Cir. June 29, 2000); *White v. Rogers*, No. 99-4231 (8th Cir. June 29, 2000); *Bailey v. Anchor Packaging*, No. 99-4272 (8th Cir. June 29, 2000); *Wallace v. Ellisville Health*, No. 99- 3755 (8th Cir. July 3, 2000); *Appelquist v. KATV*, No. 99-4210 (8th Cir.

(Footnote 3 continued on next page.)

standards this Court invalidated in *Reeves*. Therefore, the Court should vacate and remand this decision for reconsideration in light of *Reeves*.

(Footnote 3 continued.)

July 3, 2000); *McAlphin v. Morgan*, No. 99-4112 (8th Cir. July 5, 2000); *Boersig v. Union Electric Co.*,

No. 99-2699 (8th Cir. July 6, 2000); *Price v. McDonnell Douglas*, No. 99-2925 (8th Cir. July 6, 2000); *Gassoway v. Metropolitan*, No. 99-3030 (8th Cir. July 10, 2000); *Armstrong v. United States*, No. 00-1843 (8th Cir. July 12, 2000); *Hogrefe v. State of NE, et al.*, No. 00-1554 (8th Cir. July 12, 2000); *Graham v. Rosemount, Inc.*, No. 99-2634 (8th Cir. July 12, 2000); *Stekloff. v. St. John's Mercy*, No. 99-3016 (8th Cir. July 12, 2000); *Griffin v. SuperValu*, No. 99-2330 (8th Cir. July 14, 2000); *Parish v. Gateway 2000, Inc.*, No. 99-3561 (8th Cir. July 14, 2000); *Sidles v. NE Court of Appeals*, No. 00- 2033 (8th Cir. July 17, 2000); *Hammond v. Northland Counseling*, No. 99-1672 (8th Cir. July 17, 2000); *Peterson v. Apfel*, No. 99-2760, 99-4302 (8th Cir. July 17, 2000); *Nyameke v. Curators of the Univ.*, No. 98-3750 (8th Cir. July 18, 2000); *Taylor v. QHG of Springdale*, No. 99-4207 (8th Cir. July 18, 2000); *Waddell v. University of MN*, No. 99-3120 (8th Cir. July 19, 2000); *McCabe v. IDS No. 625*, No. 99-2617 (8th Cir. July 20, 2000); *Anderson etc, v. State of NE, et al.*, No. 99- 3414 (8th Cir. July 20, 2000); *Calvin v. Yellow Freight*, No. 99-3829 (8th Cir. July 20, 2000); *Ellett v. Big Red Keno*, No. 99-3046, 98-3694 (8th Cir. July 21, 2000); *Mizell v. IBP*, No. 99- 3506 (8th Cir. July 21, 2000); *Sandhill, Inc. v. City of Springfield*, No. 99-3660 (8th Cir. July 21, 2000)).

Of the forty-one summary judgment appeals, thirty-nine summary judgments have been affirmed; twenty-one *per curiam* without opinion, and eighteen with opinion. Two summary judgments were reversed without citation to *Reeves*. Only three decisions have even cited *Reeves*. Two of the three provided an analysis of the decision and its effect, with the most exhaustive analysis coming from a district court judge sitting by designation.

I. THE DISTRICT COURT AND THE EIGHTH CIRCUIT IGNORED CRITICAL EVIDENCE THAT THE UNIVERSITY APPLIED DIFFERENT STANDARDS TO LAWRENCE'S TENURE APPLICATION THAN APPLIED TO SIMILARLY SITUATED MALES

Reeves established that on summary judgment in Title VII cases, lower courts must credit the employee's evidence establishing a prima facie case of discrimination and challenging the employer's "legitimate, nondiscriminatory reasons" for the alleged adverse employment action. *Reeves,* 68 U.S.L.W. at 4484. Here, as in *Reeves,* the District Court failed credit Lawrence's evidence that the University's reasons for denying her tenure were unworthy of belief.[4]

As Judge McMillian noted in his dissent in this case:

> "The Curators have proffered the following explanation for the decision to deny Lawrence tenure:
>
> > 'Lawrence received negative recommendations for promotion in six out of seven levels of review by the University, and her weak research record was cited as the principal reason. The undisputed material facts show that Lawrence did not publish in any top-tier journals, that her publications were all co-authored except for one article arising from her dissertation, and that four of the six outside reviewers who examined her research expressed criticism of her publication record.'

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[4] The University and District Court conceded that Lawrence had made out a prima facie case.

Brief for Appellees at 21.

In response to this justification, Lawrence presented evidence and arguments to discredit each of the reasons given by the Curators for the denial of her tenure application. As I have stated, her burden at the summary judgment stage was not to prove her case, but to show the existence of a genuine issue of material fact. In my opinion, her affirmative evidence of pretext has established an issue of fact as to whether gender played a role in her peers' *subjective* evaluation of her tenure application. *See id.* at 3 (the tenure decision "necessarily entails judgment of quality which is subjectively made by the applicants' peers").

In response to the Curators' assertion that "[t]he undisputed material facts show that Lawrence did not publish in any top-tier journals," Lawrence introduced evidence suggesting that the standards for what constituted a "top-tier" journal changed over time and, moreover, were applied unequally to her as compared with male candidates. For example, in 1992, the Director of the School of Accountancy, Raymond Dockweiler, wrote a letter to the Dean of the Business School, Bruce Walker, supporting a male tenure applicant, Robin Roberts, and stating in connection with Roberts's publications in RIGNA (in which Roberts had published two co-authored articles, *see* Appellant's Appendix at 502-03): "Since RIGNA is a publication of the American Accounting Association (AAA) and is the leading outlet for research in the area of governmental and nonprofit accounting, a growing number of accounting academics view it as a prestigious journal." Appellant's Appendix at 498. By contrast, when recommending to Dean Walker that Lawrence be denied tenure, Dockweiler wrote in 1994- *notwithstanding Lawrence's publication*

of a sole-authored article in RIGNA-that her "lone problem area has been in the area of research. Quite simply she has not yet published in a top-tier research journal." *Id.* at 264.

Similarly, when Dean Walker wrote a letter to the Provost in 1992 supporting Roberts's tenure application, he favorably described RIGNA as "among the top dozen or so research journals in the accounting field." *Id.* at 491- 92. By contrast, in recommending that Lawrence not be granted tenure, Dean Walker wrote in 1994 that the quality of her research fell short-notwithstanding her publication in RIGNA-because she had not published a single article in "a journal clearly recognized as one of the very best in the accountancy field." *Id.* at 253. In other words, while Dockweiler and Walker praised Roberts for publishing in RIGNA, they all but criticized Lawrence for publishing in the very same journal. *[footnote omitted]*

Moreover, a review of the evaluations Lawrence received during her years on the tenure track support the conclusions that she was led to believe, and reasonably did believe, that research journals such as RIGNA were precisely the type of journals the department deemed worthy of tenure track publications. *See id.* at 243 (1990 written evaluation from School of Accountancy Promotion and Tenure Committee) ("the article that you have forthcoming in *Research in Governmental and Nonprofit Accounting* represents a good hit"). In other words , the evidence suggests that Lawrence met the expectations which were presented to her and she only fell short when the critical decision makers *changed* the standards as they applied to her. Indeed, Deputy Chancellor Deaton, upon reviewing Lawrence's application for promotion and tenure described this phenomenon as follows.

> 'She was led to believe that five or six journals articles would be acceptable. . . . [S]he was also assured that nationally recognized peer reviewed journals in her subfields would be acceptable. There is now argument over what constitutes quality journals in this area.
>
> The quality of her work was praised in annual reviews by the departmental [Promotion and Tenure] Committee on a consistent basis. She was urged to generate more quantity of articles which she did in her last couple of years and was then criticized for the lumpy nature of her output.'

Joint Appendix at 544-45.

In my opinion, the apparent eleventh-hour changes in the standards that that were applied to Lawrence-in addition to the evidence of unequal treatment-raise serious doubts about the sincerity of the Curators' first proffered justification for rejecting of Lawrence's tenure application, and warrant letting this case go to trial. *See. e.g., Kobrin v. University of Minnesota*, 34 F.3d 698, 702 (8th Cir. 1994) ("Substantial changes over time in the employer's proffered reasons for its employment decision support a finding of pretext.").

Lawrence has also responded to the Curators' assertion that she was denied tenure in part because her publications "were all co-authored except for one article arising from her dissertation." Again, she introduced evidence indicating that she was treated differently from male tenure candidates on this matter. For example, Robin Roberts had also co-authored all but one of his publications as the time his tenure applications was being reviewed. With respect to Roberts, Dean Walker wrote:

> 'In deciding whether to recommend that an assistant professor be promote and tenured, I consider whether the candidate has established self-sufficiency in the research area. In my judgment, Professor Roberts passes this test. Fist, he has published a sole-authored article in one of the lead journals in the field... Second, he has been the lead author on all but one of his co-authored pieces. Third, he had demonstrated the ability to work with a variety of co-authors, ranging from MU to PhD student to faculty members at other institutions.'
>
> Appellant's Appendix at 492.
>
> By contrast, with respect to Lawrence, Dean Walker wrote: 'It would be desirable if she had demonstrated her self-sufficiency in the research area by having some sole-authored articles, but only the article based on her dissertation falls into that category.' *Id.* at 253."

Lawrence v. Curators of the Univ. Of Missouri, 204 F.3d 807, 809-10 (8th Cir. 2000) *See* Appendix B, at pp. A-7-11.

While conceding that "there are facts in the record that might have justified the conclusion that [Lawrence] had a strong research record"[5] the District Court discounted the weight of that evidence, thus allowing the court to summarily conclude that:

> "[w]hatever inconsistency there is would not support a reasonable inference that Lawrence was subjected to "manifestly unequal" standards, especially given the required level of deference to the expertise necessary in making a tenure decision.

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[5] (Appendix C, at A-30)

> Therefore, the presence of arguably inconsistent comments does not support the reasonable inference that the reasons given by defendant for the denial of plaintiff's application for tenure were pretext for intentional discrimination."

See Appendix C at p. A-32. The District Court's holding is directly in conflict with *Reeves*. Given that the University's primary reason for denial of tenure was the claim that Lawrence did not have a strong research record due to the quality of the journals in which she published, the District Court, having already found that there were facts in the record justifying the conclusion that Lawrence had a strong research record, is required then to let the case go to the jury, because there are sufficient facts in the record challenging the employer's legitimate, non-discriminatory reason. This is not a case in which Lawrence presents a "weak record" of pretext or in which there is "abundant and uncontroverted independent evidence that no discrimination had occurred," such that "plaintiff's prima facie case, combined with sufficient evidence to find the employer's asserted justification false" is still insufficient to allow the case to go to the jury. *See Reeves,* 68 U.S.L.W. at 4483. Thus, the District Court's grant of summary judgment was erroneous.

II. THE DISTRICT COURT DREW ALL REASONABLE FACTUAL INFERENCES IN FAVOR OF THE UNIVERSITY AND MISCONCEIVED PLAINTIFF'S EVIDENTIARY BURDEN

Reeves made clear that in adjudicating summary judgment motions in Title VII cases, lower courts must draw all reasonable factual inferences from an employee's evidence of discrimination in favor of the employee and

may not make credibility determinations or weigh the evidence. *Reeves, 68 U.S.L.W. at 4484.* Furthermore, *Reeves* held that in adjudicating summary judgment motions in Title VII, there are clear and important limitations on the extent to which lower courts can rely upon the moving party's controverted evidence. The Court held:

> [T]he court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the non-movant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves,* 68 U.S.L.W. at 4484. (citations omitted).

In granting the University summary judgment the District Court relied almost exclusively on controverted evidence of the University:

> As Lawrence points out, there are facts in the record that might have justified the conclusion that she had a strong research record. However, there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of the publications in which her work was published. ....Therefore, the facts that Lawrence argues demonstrate that she had a strong research record show little more than 'a mere dispute over her qualifications for the position,' and those facts are not sufficient by themselves to raise a genuine issue of material fact on the issue of pretext.

See Appendix at p. A-30-31.

In dismissing what Judge McMillian characterized as "compelling" evidence of pretext to the category of a "mere dispute over qualifications for the position", the District Court violates the holding in *Reeves* that inferences are to be drawn in Lawrence's favor and that lower courts are not to weigh evidence. Furthermore, the District Court concedes that Lawrence made out a prima facie case, that is, that she met the qualifications for tenure. Therefore, it is inconsistent for the court to characterize Lawrence's evidence of pretext as a "mere dispute over qualifications." Nor does the District Court reconcile its finding that Lawrence adduced evidence which could reasonably lead to a conclusion that she had a strong research record with its requirement and pronouncement that she failed to prove that the University's stated reason for denial of tenure (the supposed low quality of the journals in which she published) was "obviously unsupported". The District Court appears to be at variance with *Reeves* in holding Lawrence to a higher standard of proof: "the facts showing pretext 'must be of such strength and quality' to allow a reasonable finder to conclude that the denial of tenure was 'obviously' unsupported or that 'the university *manifestly* applied an unequal standard to her tenure application.' (Citations omitted) *See* Appendix C, at p. A-28. Furthermore, the District Court's concession regarding Lawrence's evidence of a strong research record is inconsistent with the conclusion that Lawrence's record of pretext is "weak". If there is substantial and competent evidence of pretext, then the District Court must draw inferences from that evidence in favor of Lawrence, not the University. The District Court has turned *Reeves* upside down with respect to how inferences are

to be drawn; how evidence of pretext is to be credited and how plaintiff must meet her evidentiary burden in defending summary judgment.

CONCLUSION

Because the lower courts failed to apply the *Reeves* standard for summary judgment motions in Title VII cases, the Court should grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in light of *Reeves*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1704WMJC

Carol M. Lawrence,
Appellant,

vs.

Curators of the University of Missouri,
Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian would grant the petition. The petition for rehearing by the panel is also denied.

(5128-010199)

May 3, 2000

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1704

Carol M. Lawrence,
Appellant,

v.

Curators of the University of Missouri,
Appellee.

Submitted: November 17, 1999

Filed: February 18, 2000

[PUBLISHED]

Appeal from the United States District Court
for the Western District of Missouri

Before McMILLIAN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Carol M. Lawrence appeals the district court's grant of summary judgment to the Curators of the University of Missouri (Curators) on Lawrence's sex discrimination claim. Having reviewed the record, we conclude Lawrence is not entitled to relief. We agree with the district court's analysis that there is no substantial evidence in the record tending to show the Curators' decision for denying Lawrence's application for promotion and tenure was a pretext for sex discrimination. We thus conclude the district court correctly granted summary judgment, and we affirm for the reasons stated in

its ruling without further discussion. *See* 8th Cir. R. 47B.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent.

Carol Lawrence became a "tenure-track" professor on the faculty of the University of Missouri (the University), College of Business and Public Administration (Business College), School of Accountancy, in January of 1988. The pertinent written guidelines regarding promotion and tenure state, among other things:

> 2. *Quality Research.* Good teaching is a necessary but not sufficient criterion; quality research is also expected of all faculty in the College. The most convincing evidence of quality research is publication of research results in refereed journals of high quality.
>
> . . . .
>
> The specific criteria to be used, the relative weighting to be made, and the procedures to be followed shall be clearly established by the appropriate administrative unit prior to evaluations and recommendations. All relevant information shall be explicitly communicated to the faculty members and each unit's criteria and procedures shall be consistent with the College guidelines.

Appellant's Appendix at 225-26.

Consistent with these guidelines, Lawrence received her first written evaluation from the School of Accountancy Promotion and Tenure Committee in 1989, after one year on the tenure track. That evaluation stated, among other things:

> The Committee strongly recommends that you develop on ongoing 'inventory' of four or five active research projects. That will help assure that you will ultimately accumulate at least five or six publications in reputable journals (the apparent minimum research requirement today) by the time you come up for promotion and tenure.

Id. at 241.

The written evaluation she received in 1990 stated in part:

> In the research area, the article that you have forthcoming in *Research in Governmental and Nonprofit Accounting* [(RIGNA)] represents a good "hit," and the four research projects in process indicate good progress in developing the ongoing "inventory" of research studies we recommended last year.
>
> . . . .
>
> Overall, the Committee believes you are coming along fine and encourages you to keep up the good work.

Id. at 243.

However, the written evaluation she received in 1992, stated, among other things:

> Overall, your performance to date is viewed quite positively. You exhibit *quality* work in virtually everything you do and the Committee is aware of the extensive effort you are already devoting to your research program. However, as indicated, increasing concern is developing regarding the *quantity* of your research output.

Id. at 244 (emphasis in text). In response, Lawrence accelerated her research publication efforts and published three more papers in 1994. At the time her application for promotion and tenure was considered in the fall of 1994, she had three additional papers accepted for future publication, for a total of seven articles published or accepted for future publication.

The School of Accountancy Promotion and Tenure Committee was the first to vote on her application. The committee members voted 4-3 against promotion and tenure.[1] The next committee to review her application was the Business College's Promotion and Tenure Committee. That committee voted 5-0 against her application. Both the School of Accountancy promotion and tenure committee and the Business College promotion and tenure committee were chaired by Professor Earl Wilson. Professor Wilson explained the adverse recommendations as based upon Lawrence's record of publications — not because she published too few articles but, rather, because the research journals in which she published purportedly lacked quality. *See id.* at 266 (letter from Earl Wilson to Raymond Dockweiler, dated Nov. 1, 1994). This view was then adopted by the Director of the School of Accountancy, Raymond Dockweiler, who wrote: "[q]uite simply, she has not yet published in a top-tier research journal," *id.* at 264 (letter dated Nov. 3, 1994), and by the Dean of the Business College, Bruce Walker, who wrote: "[i]t would be heartening if one or more of her articles were published in a journal clearly recognized as one of the very best in the accountancy field." *Id.* at 253 (letter dated Dec. 2, 1994).

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[1] Needless to say, the recommendation of this committee, composed of the front-line reviewers and Lawrence's closest academic peers, was critical to the success of her tenure application.

When Lawrence's application was reviewed by the Campus Promotion and Tenure Advisory Committee, they voted 6-2 in favor of promotion and tenure. The majority concluded that the negative votes Lawrence received at the departmental and divisional levels were unjustified and, moreover, that the outside reviews were, overall, "very positive." *Id.* at 251 (Memo from Charlotte Parker, Chair of the Campus Promotion and Tenure Advisory Committee, to Chancellor Charles Kiesler). Notwithstanding that committee's recommendation, as well as the concerns expressed in writing by Deputy Chancellor Brady Deaton, *see id.* at 544-47, both the Provost of the University, Edward Sheridan, and the Chancellor of the University, Charles Kiesler, decided to deny Lawrence promotion and tenure.

As the district court recognized in the present case, the crux of this case is whether or not the Curators' proffered reasons for rejecting her tenure application represent a pretext for gender-based discrimination. *See Lawrence v. The Curators of the University of Missouri*, No. 97-4109-CV-C-9, slip op. at 14-15 (W. D. Mo. Jan. 28, 1999). I also agree with the district court's observation that, "[i]n evaluating the issue of pretext in cases involving the denial of tenure, 'courts must take special care to preserve the University's autonomy in making *lawful* tenure decisions.'" *Id.* at 15 (emphasis added) (quoting *Brown v. Trustees of Boston University*, 891 F.2d 337, 346 (1 st Cir. 1989) (*Brown*) (appeal after trial on the merits). It is axiomatic, however, that, a denial of tenure motivated by gender-based discrimination is not a lawful decision. Furthermore, though "[a] court 'may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities,'" *id.* (quoting *Brown*, 891 F.2d at 346), nor may the court substitute its own views about

the weight and credibility of the evidence for those of the jury when there is a genuine issue of material fact. In the present case, if Lawrence presented enough evidence that a reasonable jury *could* have made a finding that gender was a motivating factor, summary judgment was improperly granted. *See Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 976 (8th Cir. 1991) ("Summary judgment is to be granted only when there is no genuine issue as to any material fact. Thus, 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party,' summary judgment is not appropriate.") (internal citations omitted).

The Curators have proffered the following explanation for the decision to deny Lawrence tenure:

> Lawrence received negative recommendations for promotion in six out of seven levels of review by the University, and her weak research record was cited as the principal reason. The undisputed material facts show that Lawrence did not publish in any top-tier journals, that her publications were all co-authored except for one article arising from her dissertation, and that four of the six outside reviewers who examined her research expressed criticism of her publication record.

Brief for Appellees at 21.

In response to this justification, Lawrence presented evidence and arguments to discredit each of the reasons given by the Curators for the denial of her tenure application. As I have stated, her burden at the summary judgment stage was not to prove her case, but to show the existence of a genuine issue of material fact. In my opinion, her affirmative evidence of pretext has estab-

lished an issue of fact as to whether gender played a role in her peers' *subjective* evaluation of her tenure application. *See id.* at 3 (the tenure decision "necessarily entails judgment of quality which is subjectively made by the applicants' peers").

In response to the Curators' assertion that "[t]he undisputed material facts show that Lawrence did not publish in any top-tier journals," Lawrence introduced evidence suggesting that the standards for what constitutes a "top-tier" journal changed over time and, moreover, were applied unequally to her as compared with male candidates. For example, in 1992, the Director of the School of Accountancy, Raymond Dockweiler, wrote a letter to the Dean of the Business School, Bruce Walker, supporting a male tenure applicant, Robin Roberts, and stating in connection with Roberts's publications in RIGNA (in which Roberts had published two co-authored articles, *see* Appellant's Appendix at 502-03): "Since RIGNA is a publication of the American Accounting Association (AAA) and is the leading outlet for research in the area of governmental and nonprofit accounting, a growing number of accounting academics view it as a prestigious journal." Appellant's Appendix at 498. By contrast, when recommending to Dean Walker that Lawrence be denied tenure, Dockweiler wrote in 1994 — *notwithstanding Lawrence's publication of a sole-authored article in RIGNA* — that her "lone problem area has been in the area of research. Quite simply she has not yet published in a top-tier research journal." *Id.* at 264.

Similarly, when Dean Walker wrote a letter to the Provost in 1992 supporting Roberts's tenure application, he favorably described RIGNA as "among the top dozen or so research journals in the accounting field." *Id.*

at 491-92. By contrast, in recommending that Lawrence not be granted tenure, Dean Walker wrote in 1994 that the quality of her research fell short — notwithstanding her publication in RIGNA — because she had not published a single article in "a journal clearly recognized as one of the very best in the accountancy field." *Id.* at 253. In other words, while Dockweiler and Walker praised Roberts for publishing in RIGNA, they all but criticized Lawrence for publishing in the very same journal.[2]

Moreover, a review of the evaluations Lawrence received during her years on the tenure track support the conclusions that she was led to believe, and reasonably did believe, that research journals such as RIGNA were precisely the type of journals the department deemed worthy of tenure track publications. *See id.* at 243 (1990 written evaluation from School of Accountancy Promotion and Tenure Committee) ("the article that you have forthcoming in *Research in Governmental and Nonprofit Accounting* represents a good 'hit'"). In other words, the evidence suggests that Lawrence met the expectations which were presented to her, and she only fell short when

[2] Dean Walker justified his treatment of RIGNA as a "second-tier" journal on the basis that it received an "A" rating, as opposed to the "A+" ratings received by seven other journals, according to a rankings list, *see* Appellant's Appendix at 324, produced by the School of Accountancy (but not formally approved by the School of Accountancy's faculty). *See id.* at 253 ("the School of Accountancy's ranking of journals not only was never approved by the faculty but also included an 'A+' category of journals, which to me reduced 'A' journals (such as *Research in Governmental and Nonprofit Accounting*[)] to second-tier status"). I believe, however, the pretextual nature of this explanation is a matter of genuine dispute if the same treatment was not applied for male tenure applicants and, moreover, if Lawrence was affirmatively led to believe that RIGNA was considered to be a sufficiently high-ranking journal.

the critical decision makers *changed* the standards as they applied to her. Indeed, Deputy Chancellor Deaton, upon reviewing Lawrence's application for promotion and tenure, described this phenomenon as follows.

> She was led to believe that five or six journals articles would be acceptable . . . . [S]he was also assured that nationally recognized peer reviewed journals in her subfields would be acceptable. There is now argument over what constitutes quality journals in this area.
>
> The quality of her work was praised in annual reviews by the departmental [Promotion and Tenure] Committee on a consistent basis. She was urged to generate more quantity of articles which she did in her last couple of years and was then criticized for the lumpy nature of her output.

Joint Appendix at 544-45.

In my opinion, the apparent eleventh-hour changes in the standards that were applied to Lawrence — in addition to the evidence of unequal treatment — raise serious doubts about the sincerity of the Curators' first proffered justification for rejecting of Lawrence's tenure application, and warrant letting this case go to trial. *See, e.g., Kobrin v. University of Minnesota*, 34 F.3d 698, 702 (8th Cir. 1994) ("Substantial changes over time in the employer's proffered reasons for its employment decision support a finding of pretext.").

Lawrence has also responded to the Curators' assertion that she was denied tenure in part because her publications "were all co-authored except for one article arising from her dissertation." Again, she introduced evidence indicating that she was treated differently

from male tenure candidates on this matter. For example, Robin Roberts had also co-authored all but one of his publications at the time his tenure application was being reviewed. With respect to Roberts, Dean Walker wrote:

> In deciding whether to recommend that an assistant professor be promoted and tenured, I consider whether the candidate has established self-sufficiency in the research area. In my judgment, Professor Roberts passes this test. First, he has published a sole-authored article in one of the lead journals in the field. . . . Second, he has been the lead author on all but one of his co-authored pieces. Third, he has demonstrated the ability to work with a variety of co-authors, ranging from MU PhD students to faculty members at other institutions.

Appellant's Appendix at 492.

By contrast, with respect to Lawrence, Dean Walker wrote: "It would be desirable if she had demonstrated her self-sufficiency in the research area by having some sole-authored articles, but only the article based on her dissertation falls into that category." *Id.* at 253.

The Curators also justify the tenure decision on the basis that, according to "[t]he undisputed material facts . . ., four of the six outside reviewers who examined [Lawrence's] research expressed criticism of her publication record." In my view, the interpretation and weight to be given the comments made by the outside reviewers are matters within the sound discretion of the University in a proper tenure review process. In this case, however, even assuming that four of the six outside reviewers were "critical" of her research, their purported criticisms are confined to the following issues:

the number of her publications, the quality of the journals in which she had published, and the number of co-authored publications. *See* Brief for Appellees at 9-10 (summarizing the outside reviews). In other words, all of their criticisms involve matters which have already been discredited as *actual* reasons for the University's tenure decision. Based on the evidence discussed above — indicating that Lawrence was misled into believing that she was meeting the applicable tenure standards and that male tenure candidates were not held to the same standards — a genuine factual dispute remains as to the truthfulness of the Curators' proffered reasons for the adverse tenure decision.

Finally, the Curators' assert: "Lawrence received negative recommendations for promotion in six out of seven levels of review by the University." That assertion, however, merely begs the question of what motivated those negative tenure recommendations. Clearly, if those recommendations resulted in part from gender-based discrimination, they cannot serve as an independent basis for the adverse decision, and thereby insulate the Curators from liability. In the present case, Lawrence's strongest evidence of pretext corresponds with the earliest stages of the tenure review process. Moreover, it is reasonable to infer, based upon the evidence, that the negative opinions formed at the latter stages of the review process were largely influenced by the negative recommendations made at the earlier stages. The overall record of negative recommendations, upon which the Curators rely, simply cannot establish that the Curators are entitled to judgment as a matter of law.

In sum, because Lawrence has presented compelling affirmative evidence of pretext, and our *de novo* review requires us to resolve all reasonable inferences in favor

of the non-moving party, I would hold that there is a genuine issue of fact concerning gender-based discrimination. Notwithstanding the Curators' repeated argument that Lawrence had a weaker application that her male counterparts, the comparison is somewhat beside the point in this case because there are genuine factual issues as to whether the key decision makers applied materially different standards to her and her male counterparts and, moreover, whether they gave her misleading signals about their expectations when she most needed to know what the applicable standards would be. Because I believe that gender-based discrimination can reasonably be inferred from the evidence, I conclude that the district court erred in granting summary judgment for the Curators.

I would reverse and remand for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 97-4109-CV-C-9

CAROL M. LAWRENCE,
Plaintiff,

v.

THE CURATORS OF THE
UNIVERSITY OF MISSOURI,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Filed: January 28, 1999]

Plaintiff Carol N. Lawrence asserts a claim for sex discrimination against the Curators of the University of Missouri under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e, *et seq.* Lawrence seeks damages and equitable relief on the ground that defendant denied her application for promotion and tenure because of her sex.

Defendant moves for summary judgment on the ground that defendant denied Lawrence's application for promotion and tenure for legitimate, nondiscriminatory reasons and that Lawrence has failed to present facts showing that defendant's reasons are a pretext for intentional discrimination.

I.

SUMMARY JUDGMENT STANDARD

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); *Inland Oil & Transp. Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir. 1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2555 (1986). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 2553.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file,

together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party *is not required* to support its motion with affidavits or other similar materials *negating* the opponent's claim. *Id.* (emphasis added).

The nonmoving party then must go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Anderson*, 106 S. Ct. at 2511. Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submis-

sion to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

II.

FACTS

Based on the parties' pleadings, affidavits, deposition testimony, and admissions on file, the following facts are undisputed or are presented in the light most favorable to Lawrence.

Defendant the Curators of the University of Missouri (the Curators) is the governing body of the University of Missouri, a public university organized under Missouri law.

Lawrence worked as an Assistant Professor in the University of Missouri School of Accountancy from January 1988 to May 1996. In the fall of the academic year 1994-95, after Lawrence had completed six years of regular, tenure-track employment with the University, Lawrence applied for promotion and tenure.

At the University of Missouri, the granting of tenure gives a faculty member a continuous appointment with the University. Tenured faculty may only be dismissed for cause, retirement, or extraordinary circumstances. There is no limit on the number of applicants who may be granted promotion and tenure positions within a department each year at the University. Tenure is neither automatically or routinely granted. The decision whether to grant tenure is based on a rigorous and thorough review of a candidate's performance. While there are some objective minimum standards that are used in evaluating an application for tenure, the decision on promotion and tenure also involves a subjective assessment of the quality of the applicant's work made by the

applicant's peers. Candidates for promotion and tenure must demonstrate merit in three areas: teaching, research, and service. Quality research is considered a crucial element in the tenure decision.

In the years preceding a tenure-track faculty member's application for promotion and tenure, the faculty member receives annual evaluations from the School of Accountancy Promotion and Tenure Committee. Lawrence received performance evaluation letters for each successive academic year from 1988-89 through 1992-93. *See* Pl's Ex. D. Lawrence's first performance evaluation in 1989 for the 1988-89 academic year stated in part that

> [t]he Committee understands that your work in the research area to date has been limited due to the need to complete your dissertation. In this regard, you are congratulated for the AAA award you received in Honolulu for writing one of the outstanding dissertations in the governmental accounting area. Now that your dissertation has been completed, however, greater productivity in the research area will be expected. The Committee strongly recommends that you develop an ongoing "inventory" of four or five active research projects. This will help assure that you will ultimately accumulate at least five or six publications in reputable academic journals (the apparent minimum research requirement today) by the time you come up for promotion and tenure.

For the 1990-91 and 1991-92 academic years, Lawrence received positive evaluations for her work in the areas of teaching and service. In the research area, the Committee gave Lawrence positive evaluations with respect to the quality of her work. However, the committee repeat-

edly expressed concern about the quantity of articles that had been published or formally accepted for publication. Lawrence's final performance evaluation letter before applying for promotion and tenure states in part:

> With respect to research, the Committee was most complimentary of your two forthcoming articles and your recent receipt of the NSF research grant. However, the Committee also expressed concern about the quantity of your refereed publications to date in view of the fact that you have now completed four years on your tenure clock. While this concern is tempered by the three manuscripts you currently have under review and our deep respect for the high quality of your work, it must be acknowledged that tenure decisions often focus on research that has been published or formally accepted for publication in top quality journals.... [T]he Committee is aware of the extensive effort you are currently devoting to your research program. However, as indicated, the Committee is concerned that the *quantity* of your research output may be insufficient to satisfy School and College tenure standards next year.

In response to the Committee's expressed concern about the quantity of her research publications, Lawrence accelerated the pace of her research. As a result, Lawrence had three papers published in 1994. By the time her application for promotion and tenure was considered, an additional three articles had been accepted for future publication. In her application for tenure, Lawrence identified seven articles that had either been published or selected for publication in addition to her dissertation article. Two of the publications were in the journal *Research in Governmental and Nonprofit Accounting*

(RIGNA), which was rated "A" by a committee of accounting faculty at the University of Missouri.

In 1994, Lawrence applied for promotion and tenure. In general, the process for reviewing an application for promotion and tenure involves the following: First, the applicant compiles a dossier which includes the applicant's current curriculum vitae, a recitation of the applicant's teaching, research, and service activities since the previous merit evaluation, and any other information that the applicant deems relevant to the application. With the assistance of the department director, the applicant also solicits specialists in the applicant's academic field to submit outside review letters of the applicant's research. These review letter are placed in the applicant's dossier. After the dossier is compiled, recommendations are sought from a departmental committee, the department chair, a divisional committee, the dean of the college, and finally the chancellor who receives input from the provost and a campus-wide promotion and tenure advisory committee. Each of these recommendations is reduced to writing and placed in the applicant's dossier before the application is referred to the next committee or individual for recommendation.

In preparing her application for promotion and tenure, Lawrence, together with Dr. Ray Dockweiler, Director of the School of Accountancy, compiled a list of six names of individuals to serve as outside reviewers of her work. Each of the six individuals selected provided a review letter which was included in Lawrence's dossier. The institutions that these individuals represented included the Wharton School of Business of the University of Pennsylvania, Stanford University, the University of Pittsburgh, Emory University, and Boston University.

On October 28, 1994, the Promotion and Tenure Committee of the School of Accountancy (the Departmental Committee) recommended by a vote of four to three against granting Lawrence's application for promotion and tenure. On November 1, 1994, Professor Earl Wilson, acting as Chair of the Departmental Committee, wrote a letter to Dr. Raymond C. Dockweiler, Director of the School of Accountancy, explaining that although the committee felt that Lawrence's teaching and service were satisfactory, the committee felt that Lawrence's research did not meet the level necessary for promotion and tenure. *See* Pl's Ex. E, at DEF0020. Wilson placed his letter in Lawrence's dossier, and the dossier was sent to Dockweiler for a separate recommendation.

Following his review of Lawrence's dossier, Dockweiler recommended against granting promotion and tenure to Lawrence. On November 2, 1994, Dockweiler wrote to Bruce Walker, Dean of the College of Business and Public Administration, explaining that Dockweiler could not recommend granting Lawrence's application for promotion and tenure, primarily because Lawrence had failed to publish in a top-ranked journal. *See* Pl's Ex. E, at DEF0018-19.

On November 21, 1994, Lawrence submitted a rebuttal letter to Wilson's and Dockweiler's recommendations. The rebuttal letter was included in Lawrence's dossier which was sent for review by the Divisional Promotional and Tenure Committee (the Divisional Committee). *See* Pl's Ex. E, at DEF0010-17.

After reviewing Lawrence's dossier and discussing Lawrence's candidacy, the Divisional Committee voted unanimously against recommending Lawrence for pro-

motion and tenure. On November 23, 1994, Wilson, acting as Chair of the Divisional Committee, wrote a letter to Dean Walker explaining that the primary reason for the Divisional Committee's negative recommendation was Lawrence's failure to publish in a top research journal. *See* Pl's Ex. E, at DEF0009. The letter was included in Lawrence's dossier.

Dean Walker reviewed Lawrence's dossier and recommended against promotion and tenure. In a memo to Dr. Brady Deaton, Provost, dated December 2, 1994, which was included in Lawrence's dossier, Walker explained his negative recommendation by noting concerns about the quantity of Lawrence's publications and her failure to publish in top-ranked journals. *See* Pl's Ex. E, at DEF0006-08.

Following Walker's recommendation, Lawrence's application for tenure and promotion was reviewed by the Campus Promotion and Tenure Advisory Committee, an advisory committee to the Provost comprised of nine faculty and administrators. The Campus Promotion and Tenure Advisory Committee recommended by a six to two vote that Lawrence be recommended for promotion and tenure. In a letter to the Chancellor dated February 1, 1995, Dr. Charlotte Parker, Chair of the Committee, stated:

> The Campus Promotion and Tenure Advisory Committee sees nothing in the dossier of Carol M. Lawrence to warrant the negative votes received at the department and division levels. There is considerable evidence of creativity and teaching in research which is not mentioned in the evaluations of the department and division. Overall, the outside reviews were very positive.

See Pl's Ex. E, at DEF0005.

Next, Lawrence's application was sent to the Provost, Dr. Edward Sheridan, for a recommendation. As Provost, Sheridan was the chief academic officer of the University. Sheridan referred the matter to Dr. Brady Deaton, who had served as Provost prior to Sheridan.

In preparing his recommendation, Deaton reviewed Lawrence's application, external review letters, annual evaluations, one of Lawrence's published articles, and Lawrence's written rebuttal to the recommendations of the Departmental Committee and the Department Chair. In addition, Deaton met with the following individuals regarding Lawrence's application: Lawrence, Dockweiler, Wilson, Walker, Parker, Professors Loren Nikolai and James Stallman from the School of Accountancy, and Lori Franz, Associate Dean of the College of Business and Public Administration. Following his investigation, Deaton recommended that, if possible, evaluation of Lawrence's application be delayed for one year "as a means of gaining a more accurate understanding of her long term contribution to the profession." However, Deaton recommended that if a decision had to be made immediately, he did not believe that "the quality of [Lawrence's] record" was "sufficient for promotion and tenure at this time." *See* Pl's Ex. R.

It is unclear from the record whether delaying plaintiff's application was an option or whether, if delay was an option, Sheridan considered it. However, relying on Deaton's recommendation, Sheridan recommended against granting Lawrence's application for promotion and tenure.

Following Sheridan's recommendation, Lawrence's application was reviewed by Dr. Charles A. Kiesler, the Chancellor for the University of Missouri. In preparing

his decision, Kiesler reviewed Lawrence's dossier and examined Lawrence's accomplishments, teaching, and publication record. He examined the outside review letters and, based on his experience reading outside review letters, concluded that the concerns raised in those letters were intended to be negative comments by the outside reviewers. Based on his review, Kiesler recommended not to grant Lawrence promotion and tenure.

After Kiesler's decision, Lawrence submitted a letter to Kiesler requesting reconsideration of the decision. Lawrence's letter was given to Sheridan for an independent review and response. In reviewing Lawrence's request for reconsideration, Sheridan read Lawrence's dossier and discussed her application with Walker and Deaton. Sheridan considered the letters from outside reviewers and noted their repeated concerns with Lawrence's failure to publish in top journals. He concluded that the outside review letters were "very weak" endorsements of Lawrence and gave that conclusion substantial weight in his review.

Sheridan concluded that Lawrence had not met the standards for tenure and denied her request for reconsideration. In addition to Lawrence's failure to publish a single article in a top-level journal, Sheridan stated that he felt that Lawrence had not demonstrated that she was making important contributions to her field. Furthermore, Sheridan stated that he felt that the fact that Lawrence had received no positive votes in the College of Business and Public Administration (the Divisional Committee) was a strong negative endorsement.

In a letter dated April 2, 1996, Sheridan notified Lawrence that her appeal had been denied.

Before Lawrence's application was considered, the last male faculty member to receive promotion and tenure was Robin Roberts. *See* Pl's Ex. Q (Roberts' dossier). Roberts was granted promotion and tenure in 1992. At the time he submitted his application for promotion and tenure, seven of Roberts' articles had been published or selected for publication, including two in the *RIGNA*. All but one of Roberts' articles were co-authored. The sole-authored article was published in *Accounting, Organizations & Society,* a journal rated "A+" by the same committee of accounting faculty that had given *RIGNA* an "A" rating. Pl's Ex. F. Another of Roberts' articles was published in the *Journal of Accounting Research,* which was rated "A+" by the University of Missouri committee.

During the same academic year that Lawrence applied for promotion and tenure, the School of Accountancy granted the application for promotion and tenure of a male candidate, Inder K. Khurana. *See* Pl's Ex. J (Khurana's dossier). At the time he submitted his application, Khurana had published eleven articles. All but one of Khurana's published articles were co-authored. Two of Khurana's articles, including the sole-authored article, had been published in *The Accountancy Review,* a journal rated "A+" by the committee of accounting faculty. Pl's Ex. F.

In 1996, the academic year following the denial of Lawrence's application for tenure, Vairam Arunachalam, a male, was granted tenure. *See* Pl's Ex. I (Arunachalam's dossier). At the time he submitted his application for tenure, Arunachalam had either published or had selected for publication 12 articles in academic journals as well as four articles in professional journals. Ten of the 12 articles published in academic journals were co-

authored. One of Arunachalam's articles appeared in *Journal of Information Systems,* a journal rated "A+" by the committee of Accounting Faculty at the University of Missouri. Pl's Ex.. F. Several of the journals in which Arunachalam published articles were non-accounting journals.

III.

DISCUSSION

Defendant argues that Lawrence has failed to present facts sufficient to permit the reasonable inference that defendant's proffered reason for denying Lawrence's application for promotion and tenure was a pretext for intentional sex discrimination.

To prevail in a claim for Title VII discrimination under the three-part test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973), the plaintiff must first establish a prima facie case of discrimination. *McDonnell Douglas,* 93 S. Ct. at 1824. If the plaintiff establishes *a* prima facie case, the employer has the burden of coming forward with facts to rebut the presumption of discrimination by articulating a legitimate non-discriminatory reason for the adverse employment action. *Texas Dep't of Community Affairs v. Burdine,* 101 S. Ct. 1089, 1094 (1981); *McDonnell Douglas*, 93 S. Ct. at 1824; *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996). If the defendant articulates a nondiscriminatory reason, then the burden of production shifts back to the plaintiff to establish that the defendant's reason for the adverse employment action is a "mere pretext" for discrimination. *McDonnell Douglas,* 93 S. Ct. at 1825 *Price*, 75 F.3d at 365. However, the plaintiff "at all times carries the burden of persuasion to show that [the adverse employment action] was moti-

vated by intentional discrimination." *McDonnell Douglas,* 93 S. Ct. at 1825; *see Burdine,* 101 S. Ct. at 1093.

Defendant does not argue that plaintiff has failed to present facts sufficient to establish a prima facie case. Likewise, plaintiff does not argue that defendant has failed to offer a nondiscriminatory reason for its decision to deny tenure to plaintiff. Therefore, I will assume for the purpose of ruling defendant's summary judgment motion that plaintiff has presented facts sufficient to make out a prima facie case and that defendant has set forth a nondiscriminatory reason for denying Lawrence's application for promotion and tenure.

To establish pretext, the employee must either show discriminatory intent 1) directly, by showing that a discriminatory reason more likely motivated the decisionmaker(s) to make the adverse employment decision; or 2) indirectly, by showing that the employer's proffered explanation for the decision is so "'unworthy of credence' to permit a trier of fact to find that a discriminatory . . . reason motivated the discharge." *Harvey v. Anheuser-Busch, Inc.,* 38 F.3d 968, 971 (8th Cir. 1994) (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 514, 113 S. Ct. 2742, 2749 (1993)).

In evaluating the issue of pretext in cases involving the denial of tenure, "courts must take special care to preserve the University's autonomy in making lawful tenure decisions." *Brown v. Trustees of Boston University,* 891 F.2d 337, 346 (1st Cir. 1989) (cited with approval in *Kobrin v. University of Minnesota,* 34 F.3d 698, 704 n.4 (8th Cir. 1994)). A court should not "sit as a 'super personnel council' to review tenure decisions," *Kobrin,* 34 F.3d at 704 n.4 (quoting *Brousard-Norcross v. Augustana College Ass'n,* 935 F.2d 974, 976 (8th Cir.

1991)). A court "may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities." *Brown*, 891 F.2d at 346. Thus, to show that a defendant's reasons for denying tenure are pretextual, the plaintiff must show something more than just a dispute over her qualifications for tenure. *See Kobrin*, 34 F.3d at 704 n. 4.

To prove pretext in the context of a tenure decision, the plaintiff might present facts showing that the reasons for the denial were "obviously weak or implausible." *Brown*, 891 F.2d at 346. Alternatively, the plaintiff might present facts showing that the standards used in making the tenure decision were "manifestly unequally applied." *Id.* However, the facts showing pretext "must be of such strength and quality" to allow a reasonable finder of fact to conclude that the denial of tenure was "obviously" unsupported or that "the university *manifestly* applied an unequal standard to her tenure application." *Id.* (emphasis in original). Finally, "[d]epartures from procedural regularity, *such as a failure to collect all available evidence*, can raise a question as to the good faith of the process where the departure may reasonably affect the decision" and therefore provide a sufficient basis for the reasonable conclusion that the reason given for the decision was pretextual. *Brousard-Norcross*, 935 F.2d at 977 (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984)) (emphasis added in *Brousard-Norcross).*

In this case, the primary reason that defendant offered for the denial of Lawrence's application for promotion and tenure was the weakness of Lawrence's publication record, specifically Lawrence's failure to publish an article in a top research journal. Lawrence makes several arguments why the defendant's reason for denying her application for tenure and promotion was pretextual.

First, Lawrence argues that the University's tenure guidelines do not require publication in a "top research journal" and that Lawrence was never informed in her annual performance review letters that publication in a "top research journal" was a requirement for tenure. Because Lawrence published articles in more than five or six reputable, refereed journals, as she was told to do in her first evaluation letter in 1989, Lawrence argues that her research record should have qualified her for tenure.

It is undisputed that the decision whether to grant promotion and tenure necessarily involves a subjective judgment of quality made by the applicant's peers. Therefore, even accepting Lawrence's assertion that she met the minimum objective requirements for tenure, the fact that she was judged based on a standard that required her to exceed those minimum standards does not support the reasonable inference that the decision to deny her tenure was "obviously unsupported."

Furthermore, Lawrence has not presented facts showing that male applicants were granted tenure for meeting only the minimum requirements. Rather, a look at the dossiers of Arunachalam and Roberts reveals that those applicants were also judged based in part on whether they had published articles in "top quality" journals. *See* Pl's Exs. I, Q. Therefore, facts showing that Lawrence met the objective minimum requirements for tenure do not, by themselves, support a finding of pretext in this case.

Second, Lawrence points to several facts that arguably show that the quantity and quality of her research was sufficient to qualify her for tenure under the standards that her evaluators stated they were applying in

evaluating her application. Lawrence points out that 1) she exceeded the minimum standards set forth by the Promotion and Tenure Committee in her annual evaluations by publishing seven articles in addition to her dissertation; 2) she published two articles in *Research in Governmental and Nonprofit Accounting (RIGNA)*, which had been rated as an "A" journal by University of Missouri faculty and characterized as "a good hit" by the Promotion and Tenure Committee in Lawrence's annual review letter for 1989-90; and 3) the year before she applied for tenure, the Director of the School of Accountancy rated Lawrence third out of ten full time faculty in the area of research. Lawrence also points to the Campus -Wide Promotion and Tenure Committee's statement that it could see nothing in Lawrence's dossier to justify a negative vote.

As Lawrence points out, there are facts in the record that might have justified the conclusion that she had a strong research record. However, there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of the publications in which her work was published. For example, James M. Patton, one of the outside reviewers selected by Lawrence and a former Co-Editor of *RIGNA* stated that "[o]ne feature of Professor Lawrence's research record that deserves further investigation is the quality of the journals in which she has published or plans to submit to. *To date she has no publications in the very top tier accounting journals.*" Pl's Ex. E, at DEF0071 (emphasis added). Therefore, the facts that Lawrence argues demonstrate that she had a strong research record show little more than "a mere dispute over her qualifications for the position," and those facts are not

sufficient by themselves to raise a genuine issue of material fact on the issue of pretext.

Lawrence does not dispute that the applications for tenure of both Arunachalam and Roberts were judged on the same general criteria as Lawrence's application: teaching, service, and research. With respect to research, Lawrence has not offered any facts showing that Arunachalam and Roberts were not judged based on their record of publishing in "top tier" or "prestigious" journals. In general, there are differences between Lawrence's publication record and Arunachalam's and Roberts' publication records that support the conclusions that the university reached, i.e., that Roberts' and Arunachalam's publication records were worthy of tenure while Lawrence's was not.

Third, Lawrence points out several instances in which she argues that her qualifications were treated differently than the same or similar qualifications of male applicants. For example, Lawrence points out that her grant and other activities were viewed negatively by some of her reviewers, while similar activities were viewed as positives by those reviewing Arunachalam's application. Lawrence also points out that her reviewers did not credit her grant activities and her work with doctoral students in evaluating her research record, while similar activities by Arunachalam were viewed as positives. Lawrence argues that negative comments in her outside evaluation letters are "blown out of proportion" while similar negatives in Arunachalam's and Roberts' outside evaluation letters were overlooked. Lawrence also argues that in evaluating Roberts' application, Dockweiler and Walker characterized *RIGNA* as a top research journal while those same evaluators concluded that Lawrence had not published in a top tier

journal even though she had also published two articles in *RIGNA*. Compare Pl's Ex. E. at DEF0007, DEF0018, *with* Pl's Ex. Q. at 005962-63, 005969.

The comments made in the written recommendations not to grant Lawrence's application are not patently inconsistent with comments made in recommendations to grant the two male applicants' applications. Whatever inconsistency there is would not support a reasonable inference that Lawrence was subjected to "manifestly unequal" standards, especially given the required level of deference to the expertise necessary in making a tenure decision. Therefore, the presence of the arguably inconsistent comments does not support the reasonable inference that the reasons given by defendant for the denial of plaintiff's application of tenure were pretext for intentional discrimination.

Finally, Lawrence points to facts showing that two individuals voted more than once in evaluating her application for promotion and tenure, while no individual voted more than once in evaluating the applications of Roberts and Arunachalam. Lawrence points to the concern raised by former Provost Deaton about "the need to alter the voting process to avoid double counting and provide appropriate hearings to the candidate." Pl's Ex. R. at 4. Deaton had observed that in Lawrence's case, the department chair voted both as department chair and as a faculty member on the departmental committee and that an individual had voted on both the divisional committee on the departmental committee. *Id.* at 1. Lawrence asserts that no double counting of votes occurred during the evaluations of Arunachalam's and Roberts' applications for tenure.

Plaintiff has not presented any facts showing that there was a general prohibition against the same person

serving in more than one capacity in the review process. Nor has plaintiff presented facts showing that there were differences between the way that committee members and committee chairs were selected in Lawrence's case and the way that they were selected in the cases of Roberts and Arunachalam. Without more information about the process used to select committee members and committee chairs, it is impossible to draw any reasonable conclusion about why two individuals might have served in dual roles in Lawrence's case or why no person served in dual roles in the cases of Roberts or Arunachalam. The fact that one or two individuals served in more than one position during the evaluation of Lawrence's application but no individual served in more than one position in evaluating two male candidates does not, by itself, support the reasonable conclusion that there was a departure from procedural regularity in Lawrence's case that raises a question about the good faith of the selection process.

Undoubtedly, inconsistencies could always be found in comparing a University's treatment of one application for tenure to the University's treatment of another application for tenure, especially when the applications are being reviewed at different times or by different decision-makers. In this case, whether viewed singly or together the inconsistencies that Lawrence has pointed to between the treatment of her tenure application and the treatment of the tenure applications of Roberts and Arunachalam do not support the reasonable inference that the recommendations not to grant her application for promotion and tenure were obviously unsupported or that she was subjected to a manifestly unequal standard. Therefore, Lawrence has failed to present facts supporting the reasonable conclusion that the reasons

given by defendant for denying Lawrence's application for promotion and tenure are so unworthy of credence that Lawrence's sex must have motivated the decision.

IV.

CONCLUSION

Accordingly, it is ORDERED that defendant's Motion for Summary Judgment (Doc. 37) is granted.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri

January 28, 1999.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 97-4109-CV-C-9

CAROL M. LAWRENCE,
Plaintiff (s),

v.

THE CURATORS OF THE
UNIVERSITY OF MISSOURI,

Defendant (s).

JUDGMENT IN A CIVIL CASE

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_X_ Decision by Court. This action has come before the Court as a briefed matter and a decision has been rendered.

IT IS ORDERED that defendants Motion for Summary Judgment (doc #37) is granted.

January 27, 1999
Date

R. F. Connor
Clerk

/s/ K. M. (illegible)
Deputy Clerk

Entered 2-8-99

(2)

No. 00-0171

Supreme Court, U.S.
FILED
AUG 31 2000
CLERK

In The

Supreme Court of the United States

CAROL LAWRENCE,

Petitioner,

v.

THE CURATORS OF THE UNIVERSITY OF MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's order granting summary judgment for Respondent on Petitioner's Title VII gender discrimination claim on the ground that Petitioner had failed to offer evidence sufficient to allow a reasonable jury to infer that the Respondent's legitimate nondiscriminatory reason for denying Petitioner tenure was pretextual.

Does the Eighth Circuit's opinion conflict with this Court's subsequent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 68 U.S.L.W. 4480 (June 12, 2000)?

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STATEMENT OF THE CASE

This case arose when the University of Missouri denied Carol Lawrence's application for promotion and tenure because of her weak research record. Disclaiming that this was the University's true reason for refusing her tenure, Lawrence filed suit alleging she was a victim of gender discrimination. Finding that Lawrence failed to offer sufficient evidence from which a jury could reasonably infer that the reason offered by the University for denying her tenure was pretextual, the District Court granted the University's summary judgment motion, and the Eighth Circuit affirmed that order. Contrary to Lawrence's assertion that the question before this Court is whether a judge or jury should resolve "substantive factual disputes," the true question is a more preliminary one – whether Lawrence presented evidence sufficient to create a substantive factual dispute as to whether the University's reason for denying her tenure was pretextual.

Candidates for tenure at the University must demonstrate achievement in three areas: teaching, research, and service. The University's published tenure guidelines, which were in effect at the time of Lawrence's hire, consider quality research to be a crucial element in the tenure decision. Specifically, these guidelines apprise the tenure candidate of the necessity to offer evidence of effective and sustained published research with the warning that "[q]uantity can be a consideration but quality

must be the primary one." (App. 236-37).[1] Guidelines governing Lawrence's application for tenure as a professor in the University's School of Accountancy also instructed Lawrence that the "most convincing evidence" of quality research is publication of research results in "refereed journals of high quality." (App. 225). Although these tenure guidelines set out the standards by which tenure decisions are made, these same guidelines also caution the applicant that the "mere achievement of a minimum standard in no way guarantees either tenure or promotion." (App. 226).

In addition to the published guidelines, Lawrence received annual evaluations during the six-year period prior to her tenure application which also advised her of the importance of high quality research. In her first performance evaluation, Lawrence was urged by the evaluation committee to develop an ongoing inventory of four or five active research projects to ensure that she would "ultimately accumulate at least five or six publications in reputable academic journals (the apparent *minimum* research requirement today)" by the time she applied for tenure. (App. 241) (emphasis added). Two years later, Lawrence's evaluators noted that she had published only one article, based upon her doctoral dissertation, and urged her to place a high priority on research in the next few years so that she could publish in quality publications. The next year, Lawrence's evaluation emphasized

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[1] Where actual quotations from the record below are used, citations to *Appellant's Appendix* filed with the Eighth Circuit are noted as "App." References to the Appendices found in the *Petition for Writ of Certiorari* are noted as "Pet. App."

the evaluation committee's increasing concern with her failure to publish in quality journals. Lawrence's last pre-tenure evaluation again raised the concern with her research record, cautioning her that "it must be acknowledged that tenure decisions often focus on research that has been published or formally accepted for publication in top quality journals." (App. 246).

In her 1994 tenure application, Lawrence's research included the sole-authored article published in 1990 based on her dissertation, one co-authored article published in 1993, three co-authored articles published in 1994, two co-authored articles which had not yet been published, and one conditionally-accepted co-authored article which had not yet been published. Not one of these articles was published in one of the seven accounting journals rated by Lawrence's peers as a top-ranked or "A+" journal; two of Lawrence's articles were published in *Research in Governmental and Nonprofit Accounting* ("*RIGNA*"), a publication rated as a second-tier or "A" journal by the School of Accountancy "several years" before Lawrence applied for tenure. (App. 258, 324). Although Lawrence had not published in a top-ranked journal at the time of her application, she identified in her application four of the seven top-ranked journals as target publications for work she had in progress.

As part of her tenure application, Lawrence was required to submit her research to six peers outside the University who either taught or practiced in her field. Four of the six outside reviewers openly criticized Lawrence's publication record. Dr. James M. Patton, a former co-editor of *RIGNA*, specifically noted that "[o]ne feature of Professor Lawrence's research record that deserves

further investigation is the quality of the journals in which she has published. *To date she has no publications in the very top tier accounting journals.*" (App. 298, 317) (emphasis added). A professor from the Wharton School of the University of Pennsylvania noted "two potential limitations to her record: (i) the number of publication is somewhat small and (ii) none of the papers are published in the top-tier accounting journals." (App. 318). Dr. Grace Pownall, an accounting professor at the Emory School of Business, stated that "[t]he biggest weakness in Carol's vita is its lack of first-tier publications." (App. 321). An accounting professor from Boston University voiced his concern about the quality of Lawrence's research by stating in his review letter that "[t]he more serious concern would be with her large number of co-authored publications." (App. 323). These letters were incorporated into Lawrence's application for tenure before it was reviewed by the University.

The review of Lawrence's tenure application began with four of the seven School of Accountancy's tenured faculty voting against recommending Lawrence for tenure. The Chair of the Tenure Committee, Dr. Earl Wilson, explained in a memorandum the department's vote, citing as the reasons for the negative recommendation Lawrence's failure to publish in top-quality journals and the slow development of her research program. Noting the same concerns, the Director of the School of Accountancy decided to recommend against granting Lawrence's application for tenure. In response to these two negative recommendations, Lawrence submitted a rebuttal letter, incorporated with her tenure application, in which she acknowledged that publication in a top-ranked journal

was a "valid goal" and one she hoped "to meet in the near future," but denied that such a requirement was contained in the tenure standards. (App. 263). A committee composed of a faculty member from each of the five departments within the College of Business & Public Administration provided the next level of review for Lawrence's tenure application. This five-member committee voted unanimously against recommending Lawrence for promotion and tenure because of her failure to publish in top-quality journals. Next, the Dean of the College of Business & Public Administration reviewed Lawrence's application. The Dean noted Lawrence's failure to publish in "any journals that were clearly recognized as being among the best in the accountancy field" and recommended against granting Lawrence tenure. (App. 63-64, 255).

A campus-wide committee then reviewed Lawrence's tenure application and gave Lawrence her only positive recommendation for tenure. The head of the campus committee, Dr. Charlotte Parker, has testified, however, that no committee member had expertise in Lawrence's area of research, nor was any member knowledgeable about the quality of journals which had published Lawrence's articles. Based on Lawrence's concerns, the campus committee did discuss the possibility of gender discrimination or unfair treatment by the University, but according to Parker, the committee discovered no such evidence. Because of the positive vote by the campus committee, Dr. Brady Deaton, serving as interim Provost, carefully reviewed Lawrence's dossier, independently contacted

outside persons in the accounting field, read one of Lawrence's published articles, and met with Lawrence, Parker, the School of Accountancy Director, School of Accountancy professors, and the Dean and Associate Dean of the College of Business & Public Administration. Deaton also reviewed Lawrence's tenure application, including the written rebuttal letter prepared by Lawrence. Deaton's approach in reviewing Lawrence's application was to give Lawrence the "benefit of the doubt" in all instances. (App. 96).

Following Deaton's investigation, he suggested a possible one-year delay of Lawrence's tenure application to gain "a more accurate understanding of her long term contribution to the profession." (App. 547). Deaton concluded, however, that he would "find it difficult to argue with the assessment of the department and division that the quality of this record is not sufficient for promotion and tenure at this time." (App. 79-80, 547, 586-87). In reviewing Lawrence's tenure application, Deaton specifically investigated whether gender discrimination influenced the denial of her tenure application and determined that it had not. Relying on Deaton's recommendation, the newly-appointed Provost, Dr. Edward Sheridan, subsequently recommended against granting Lawrence's application for promotion and tenure. The University's Chancellor conducted the final formal evaluation of Lawrence's tenure application. In his independent review of Lawrence's entire tenure application, the Chancellor viewed four of the six outside review letters as negative and concluded that Lawrence's research record did not merit an award of tenure.

Following the Chancellor's decision, Lawrence appealed the denial of her application to the Provost. Although Provost Sheridan had initially relied on the advice of Deaton in denying Lawrence's application, Sheridan then conducted an independent review of Lawrence's entire dossier for purposes of reconsidering Lawrence's application. In his review, Sheridan particularly observed the concerns raised by the outside reviewers about Lawrence's failure to publish in top publications. Sheridan, experienced in the review of tenure applications, considered the criticisms raised by the outside reviewers to be "killer lines" – lines that the reviewers wrote with the understanding that they would harm the candidate. (App. 666-67). Sheridan concluded that the outside review letters were very weak endorsements of Lawrence and gave that conclusion substantial weight in his review. Because he determined that Lawrence failed to establish a research record worthy of tenure, Sheridan denied Lawrence's appeal.

Lawrence has offered no evidence that any University decisionmaker made any statement which even suggested gender bias. Lacking any direct evidence of gender discrimination, Lawrence based her claim on her assertion that similarly-situated males were treated more favorably. Dr. Inder Khurana was the only other professor in the School of Accountancy who applied for promotion and tenure in the same year as Lawrence. At the time he submitted his tenure application, Khurana had published two articles in top-tier or "A+" accounting journals. Khurana had published nine other articles and had an additional two articles under review by accounting journals. Khurana received unanimous endorsements at every level of review by the University and was awarded tenure.

Lawrence admits that Khurana's research record was superior to hers and that he deserved tenure. (App. 175, 182-83).

Dr. Vairam Arunachalam, a male who applied for tenure two years after Lawrence, was also granted tenure following unanimous recommendations at every level. Arunachalam's research record included 16 published articles with two of the articles appearing in "A+" journals. Outside review letters written on behalf of Arunachalam commented that his research record was "among the strongest" ever seen for a tenure candidate, his research was on the "cutting edge" in his field, and his research made him "one of the rising stars in the field of accounting information systems." (App. 389-400).

Dr. Robin Roberts submitted his promotion and tenure application the year before Lawrence's application. Although Roberts withdrew his application prior to its review by the Provost, he received favorable recommendations for tenure during the earlier stages of review. As support for her claim of discrimination, Lawrence asserts that University decisionmakers viewed Roberts' publication in *RIGNA* more favorably than her own publication in that journal. Even if Roberts were considered a similarly-situated male for comparison with Lawrence, his *RIGNA* publication was only one of his publication efforts which supported his tenure application. In addition to the *RIGNA* article, Roberts published one co-authored article and one sole-authored article in two "A+" ranked journals. Further, Roberts' outside review letters complimented him on his publication record in these top journals, commenting that his research represented a "significant contribution" to his field. (App. 523-33).

In response to the directive of Supreme Court Rule 15, the University must point out a mischaracterization of the facts in Lawrence's Petition. Lawrence asserts that *RIGNA* was characterized as a "top research journal" by the "male Chair of the Tenure Committee [Dr. Wilson] that turned Lawrence down" in his own application for promotion. Dr. Wilson's application, however, is not part of the record. The only evidence in the record regarding Dr. Wilson's promotion application is found in Lawrence's rebuttal letter. Assuming Lawrence's quotation of Dr. Wilson's application to be accurate, Dr. Wilson does not characterize *RIGNA* as a "top research journal." Rather, he states that the journal "enjoys a reputation for high quality for a relatively new journal." (App. 258). This view was apparently shared by others at the time the School of Accountancy faculty ranked *RIGNA* as an "A" journal along with 20 other journals which formed the second-tier below the seven top-ranked or "A+" journals. (App. 324).

Whether Lawrence had provided sufficient evidence from which a reasonable jury could infer that the reason given by the University to deny her tenure was false was the dispositive issue on summary judgment. The District Court, finding facts in the record that provided "a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards," concluded that "the facts that Lawrence argues demonstrate that she had a strong research record show little more than 'a mere dispute over her qualifications for the position,' and those facts are not sufficient by themselves to raise a genuine issue of material fact on the issue of pretext." (Pet. App. C at A30). Reviewing the District Court's grant

of summary judgment de novo, the Eighth Circuit agreed with the District Court's analysis, finding "no substantial evidence in the record tending to show the Curators' decision for denying Lawrence's application for promotion and tenure" was pretextual and affirming in a *per curiam* opinion "for the reasons stated" in the District Court's opinion. (Pet. App. B at A2-A3).

REASONS WHY THE WRIT SHOULD BE DENIED

Lawrence's Petition for Writ of Certiorari mischaracterizes the decisions below as conflicting with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 68 U.S.L.W. 4480 (June 12, 2000), which held that an employee who has presented sufficient evidence to reject the employer's legitimate explanation need not introduce additional independent evidence of discrimination to defeat summary judgment. *Reeves* only helps Lawrence if she has produced sufficient evidence to reject the University's legitimate explanation for denying her tenure. She has not, so *Reeves* does not mandate the granting of certiorari. Moreover, the District Court opinion clearly applies the legal standards of *Reeves* and of this Court's prior decisions with regard to Lawrence's evidentiary burden and how the evidence is to be considered when ruling on summary judgment. Because the decisions of the Eighth Circuit and the District Court were proper in all respects, the University respectfully urges this Honorable Court to deny Lawrence's Petition for Writ of Certiorari.

I. The Court of Appeals' Decision Does Not Conflict With This Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*

The Eighth Circuit, as this Court recognized again in *Reeves*, has refused to require a discrimination plaintiff to provide additional independent evidence of discrimination over and above sufficient evidence showing that the employer's legitimate nondiscriminatory reason was false in order to survive summary judgment on the issue of pretext. See *Reeves*, 68 U.S.L.W. at 4481 (citing *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir. 1994), for the proposition that a prima facie case, combined with sufficient evidence to disbelieve the employer's explanation, always creates a jury issue of whether an employer intentionally discriminated); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (referring to the Eighth Circuit's opinion below when stating, "[t]hus rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.' "); see also *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 728 (8th Cir. 1992) (noting its own rejection – even before the *Hicks* decision – of the "pretext-plus" theory in age discrimination cases). Consequently, even if the Eighth Circuit and the District Court had been faced with this issue in the University's summary judgment motion, its decision, no doubt, would have applied law consistent with this Court's decision in *Reeves*.[2]

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[2] In her attempt to portray the Eighth Circuit as a court that has ignored this Court's decision in *Reeves*, Lawrence points to

However, the issue in *Reeves* – whether additional independent evidence of discrimination was required to

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"forty-one summary judgment appeals involving employment discrimination cases" in which the Eighth Circuit has given "scant recognition" to the decision. *Petition for Writ of Certiorari* at 5 n.3. Actually, Lawrence cites forty-four cases, but these cases – many not involving summary judgment – do not present the dire situation that Lawrence describes.

Sixteen of these cases do not even involve claims of employment discrimination. See *Kennell v. Gates*, 215 F.3d 825 (8th Cir. 2000) (civil rights); *Armstrong v. Todd A. Mandell & Assoc., L.L.C.*, No. 00-1470 (8th Cir. June 15, 2000) (civil rights); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848 (8th Cir. 2000) (False Claims Act); *Stewart v. Pafford Ambulance Serv., Inc.*, No. 99-2993 (8th Cir. June 22, 2000) (Fair Labor Standards Act); *Walls v. Noel*, No. 00-1152 (8th Cir. June 29, 2000) (civil rights); *Vincent Fast Horse v. Waterbury*, No. 99-1165 (8th Cir. June 29, 2000) (civil rights); *Friedman v. City of Jacksonville*, No. 99-3662 (8th Cir. June 29, 2000) (civil rights); *Walker v. Arkansas State Hosp.*, Nos. 99-4001, 00-1351 (8th Cir. June 29, 2000) (civil rights); *White v. Rogers*, No. 99-4231 (8th Cir. June 29, 2000) (civil rights); *Applequist v. KATV*, No. 99-4210 (8th Cir. July 3, 2000) (civil rights); *McAlphin v. Morgan*, 216 F.3d 680 (8th Cir. 2000) (civil rights); *Armstrong v. United States*, No. 00-1843 (8th Cir. July 12, 2000) (civil rights); *Hogrefe v. Nebraska*, No. 00-1554 (8th Cir. July 12, 2000) (civil rights); *Sidles v. Nebraska Court of Appeals*, No. 00-2033 (8th Cir. July 17, 2000) (civil rights); *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886 (8th Cir. 2000) (False Claims Act); *Sandhill, Inc. v. City of Springfield, Missouri*, No. 99-3660 (8th Cir. July 21, 2000) (Fair Housing Act and civil rights).

An additional thirteen cases cited by Lawrence, though employment discrimination cases, clearly do not involve appellate review of the issue of pretext. See *Jackson v. United Parcel Serv.*, No. 99-2591 (8th Cir. June 14, 2000); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000); *Doumouras v. Northwest Airlines, Inc.*, 215 F.3d 852 (8th Cir. 2000); *Hocevar v. Purdue Frederick Co.*, 216 F.3d 745 (8th Cir. 2000); *Stuart v. General*

defeat summary judgment – was *not* the issue decided below. Lawrence lost on summary judgment because the

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Motors Corp., 217 F.3d 621 (8th Cir. 2000); *Bailey v. Anchor Packaging, Inc.*, 216 F.3d 270 (8th Cir. 2000); *Boersig v. Union Elec. Co.*, No. 99-2699 (8th Cir. July 6, 2000); *Price v. McDonnell Douglas Corp.*, No. 99-2925 (8th Cir. July 6, 2000); *Gassoway v. Metropolitan St. Louis Psychiatric Ctr.*, No. 99-3030 (8th Cir. July 10, 2000); *Stekloff v. St. John's Mercy Health Sys.*, 218 F.3d 858 (8th Cir. 2000); *Peterson v. Apfel*, Nos. 99-2760, 99-4302 (8th Cir. July 17, 2000); *Waddell v. Univ. of Minnesota*, No. 99-3120 (8th Cir. July 19, 2000); *McCabe v. Independent Sch. Dist. No. 625*, No. 99-2617 (8th Cir. July 20, 2000). Furthermore, it is unclear in five other cases whether the issue of pretext was even reviewed by the court. See *Tokuhoshi v. Tension Envelope Co.*, No. 99-1742 (8th Cir. June 12, 2000); *Crayton v. Cardinal Bldg. Materials, Inc.*, No. 99-2650 (8th Cir. June 29, 2000); *Simat v. Chi-Chi's, Inc.*, No. 99-2805 (8th Cir. June 29, 2000); *Wallace v. Ellisville Health Care Ctr.*, No. 99-3755 (8th Cir. July 3, 2000); *Graham v. Rosemount, Inc.*, No. 99-2634 (8th Cir. July 12, 2000).

Only eight of the cases cited by Lawrence involved employment discrimination cases in which review by the Eighth Circuit included review of the issue of pretext in the context of summary judgment. See *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707 (8th Cir. 2000); *Griffin v. Super Valu*, No. 99-2330 (8th Cir. July 14, 2000); *Parish v. Gateway 2000, Inc.*, No. 99-3561 (8th Cir. July 14, 2000); *Nyameke v. Curators of the Univ. of Missouri-Rolla*, No. 98-3750 (8th Cir. July 18, 2000); *Taylor v. QHG of Springdale, Inc.*, No. 99-4207 (8th Cir. July 18, 2000); *Ellett v. Big Red Keno, Inc.*, Nos. 98-3046, 98-3694 (8th Cir. July 21, 2000); *Mizell v. Iowa Beef Processors, Inc.*, No. 99-3506 (8th Cir. July 21, 2000); *Calvin v. Yellow Freight Sys., Inc.*, No. 99-3809 (8th Cir. August 3, 2000). Two other employment discrimination cases involving the issue of pretext came to the Eighth Circuit for review after the trial court entered judgment as a matter of law in favor of defendants. See *Phillips v. Union Pac. R.R. Co.*, 216 F.3d 703 (8th Cir. 2000); *Anderson v. Nebraska*, No. 99-3414 (8th Cir. July 20, 2000). While the Eighth Circuit's review in these ten cases is irrelevant to Lawrence's appeal, the observation that

District Court and the Eighth Circuit in its de novo review of the evidence, found that she had failed to offer sufficient evidence from which a jury could infer that the University's reason for denying her tenure was false. In determining whether Lawrence had fulfilled her burden of proof on the issue of pretext, the District Court simply required Lawrence to provide sufficient evidence that the University's proffered explanation for denying her tenure was "unworthy of credence." (Pet. App. C at A27). This Court requires no less of Lawrence. See, e.g., *Reeves*, 68 U.S.L.W. at 4482 ("[T]he plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence' ") (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). The law applied by the District Court to Lawrence's evidence of pretext in no way conflicts with the law enunciated by this Court in *Reeves*.

Similarly, no conflict with *Reeves* can be found in the scope of evidence the District Court considered before ruling against Lawrence on summary judgment, nor does any conflict arise regarding the inferences drawn by the District Court from that evidence. As *Reeves* makes clear, a court should review all of the evidence in the record and, in so doing, "should give credence to the evidence favoring the nonmovant as well as that *'evidence supporting the moving party that is uncontradicted and unimpeached,*

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only three opinions cite *Reeves* is not surprising in light of the fact that the *Reeves* decision does not conflict with the law as it has been applied by the Eighth Circuit.

at least to the extent that that evidence comes from disinterested witnesses.' " 68 U.S.L.W. at 4484 (citation omitted) (emphasis added). Furthermore, all reasonable inferences from the evidence are to be drawn in favor of the nonmoving party, and *Reeves* prohibits the court from engaging in credibility determinations or weighing the evidence. See *id.* The District Court did not violate any of these principles. Before determining that there were no disputed issues of material fact in the record to prevent its consideration of summary judgment, the District Court recognized its obligation "to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence." (Pet. App. C at A15) (citations omitted). Lawrence cannot argue that the District Court stated the law improperly.

What Lawrence argues is that the District Court did not follow that law because it "ignored" her evidence that *RIGNA* was a top journal and this evidence showed that the University's reason for denying her tenure was pretextual. Further, Lawrence charges that the District Court improperly drew all reasonable factual inferences in favor of the University. To support her argument, however, Lawrence emphasizes the following inference *drawn in her favor* by the District Court *from the facts she offered* on the issue of pretext: "As Lawrence points out, there are facts in the record that might have justified the conclusion that she had a strong research record." (Pet. App. C at A30). The District Court, however, did not stop here. In keeping with this Court's direction in *Reeves*, the District Court was obligated to give credence to uncontradicted and unimpeached evidence from disinterested witnesses

which supported the University. This is exactly what the District Court did when it pointed to evidence from one of several outside reviewers who criticized Lawrence's failure to publish in a top-tier journal:

> However, there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of publications in which her work was published. For example, James M. Patton, one of the outside reviewers selected by Lawrence and a former Co-Editor of RIGNA stated that "[o]ne feature of Professor Lawrence's research record that deserves further investigation is the quality of journals in which she has published or plans to submit to. *To date she has no publications in the very top tier accounting journals.*" Pl's Ex. E, at DEF0071 (emphasis added). Therefore, the facts that Lawrence argues demonstrate that she had a strong research record show little more than "a mere dispute over her qualifications for the position," and those facts are not sufficient by themselves to raise a genuine issue of material fact on the issue of pretext.

(Pet. App. C at A30). Simply put, considering unfavorable evidence that is undisputed and that comes from disinterested witnesses does not mean the District Court ignored Lawrence's evidence, and relying on that same evidence does not mean that the District Court wrongly made a credibility determination or weighed the evidence. The District Court merely fulfilled its obligation to consider *all* uncontroverted evidence in the record and to apply the "substantive evidentiary standard of proof" to that evidence. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 252 (1986). That there may have been some evidence in the record favoring plaintiff was not enough to prevent the entry of summary judgment against her. See *id.* ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

The issue ruled upon by the District Court and the Eighth Circuit was whether Lawrence's evidence of pretext was sufficient to allow a reasonable jury to infer that the reason given by the University for denying her tenure was unworthy of credence. Each of those courts ruled against her, but in so doing, neither faulted Lawrence for failing to offer additional independent evidence of gender discrimination. Further, neither court applied an incorrect evidentiary standard upon which summary judgment was to be determined. As such, the law as applied by the courts below poses no conflict with this Court's decision in *Reeves*, and Lawrence's Petition for Writ of Certiorari should be denied.

II. The Court of Appeals Was Correct in Affirming Summary Judgment in Favor of the University.

In affirming the entry of summary judgment against Lawrence, the Eighth Circuit's review of the record led it to conclude, for the same reasons cited by the District Court, that there was "no substantial evidence in the record tending to show" that the University's reason for denying Lawrence tenure was pretextual. (Pet. App. B at A2-A3). The reasons given by the District Court demonstrate a proper application of the controlling law to the

undisputed material facts before the court and provide yet further justification for denying Lawrence's Petition for Writ of Certiorari.

In its evaluation of pretext in a case involving the denial of tenure by a university, the District Court acknowledged that its role was not to sit in judgment as a "super personnel council" by substituting "its own views concerning the plaintiff's qualifications for those of the properly instituted authorities." (Pet. App. at A27-A28) (citing, respectively, *Kobrin v. Univ. of Minnesota*, 34 F.3d 698, 704 n.4 (8th Cir. 1994), and *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 346 (1st Cir. 1989)). The basis for the District Court's recognition of its proper role can be explained by an earlier case decided by the Eighth Circuit which also involved the denial of tenure: "Our review of a tenure decision is approached with trepidation; a grant of tenure is a significant decision for a college and one that is not made lightly. We do not profess to possess the expertise required to evaluate such decisions for their merit." *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 975-76 (8th Cir. 1991). Accordingly, the District Court correctly observed that Lawrence "must show something more than just a dispute over her qualifications for tenure." (Pet. App. C at A28) (citing *Kobrin*, 34 F.3d at 704 n.4).

This is not to say that the inherently subjective aspect of a university's tenure decision prevented the District Court from determining whether the University's reason for denying Lawrence tenure was pretextual. On the contrary, the District Court identified several means by which the University's denial of tenure could be found to be pretextual:

> To prove pretext in the context of a tenure decision, the plaintiff might present facts showing that the reasons for the denial were "obviously weak or implausible." *Brown*, 891 F.2d at 346. Alternatively, the plaintiff might present facts showing that the standards used in making the tenure decision were "manifestly unequally applied." *Id.* However, the facts showing pretext "must be of such strength and quality" to allow a reasonable finder of fact to conclude that the denial of tenure was "obviously" unsupported or that "the university *manifestly* applied an unequal standard to her tenure application." *Id.* (emphasis in original). Finally, "[d]epartures from procedural regularity, *such as a failure to collect all available evidence*, can raise a question as to the good faith of the process where the departure may reasonably affect the decision" and therefore provide a sufficient basis for the reasonable conclusion that the reason given for the decision was pretextual. *Brousard-Norcross*, 935 F.2d at 977 (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984)) (emphasis added in *Brousard-Norcross*).

(Pet. App. C at A28). Because Lawrence failed to offer sufficient evidence from which a jury could reasonably infer that the University's reason for denying her tenure was implausible or that the standards were unequally applied to her, she did not meet her burden of proof, and the District Court properly entered summary judgment in favor of the University.

Evidence offered by Lawrence to suggest that the University's reason for denying her tenure was pretextual focused primarily on the characterization of *RIGNA*, a journal in which Lawrence had published two articles.

Arguing that *RIGNA* was of sufficient quality to justify an award of tenure, Lawrence points to her 1990 annual performance evaluation which referred to her first article published in *RIGNA* as a "good hit," and to a characterization of the journal by Dean Bruce Walker as one of the "top dozen or so research journals." As the District Court properly determined, none of these statements is inconsistent with the fact that the University denied Lawrence tenure because of her failure to publish in a top-tier accounting journal. These distinctions in the characterization of a particular journal, while appearing slight, indeed have significance in the academic world.

In a ranking by School of Accountancy faculty, *RIGNA* was not rated in the top tier of the seven "A+" accounting journals.[3] This perception of *RIGNA* was not unique to the University. As the District Court pointed out, one of Lawrence's outside reviewers, the former co-editor of *RIGNA*, agreed with other outside reviewers who did not recognize *RIGNA* as a top-ranked accounting journal when he wrote, "[t]o date she has no publications in the very top tier accounting journals." (App. 298, 317). Two other outside reviewers also criticized Lawrence's failure to publish in a top-tier journal. In keeping with the *Reeves'* opinion, the District Court was correct in considering uncontroverted evidence from these disinterested witnesses. 68 U.S.L.W. at 4484. The dissenting

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[3] This ranking was submitted by Lawrence with her suggestions opposing summary judgment. Of the two other rankings of journals submitted by Lawrence, one did not even rank *RIGNA* in the top fifty journals; the other ranked it as twenty-eighth. (App. 326-27).

opinion below makes much of the fact that Robin Roberts, a male applicant for tenure, was recognized by Dean Walker for publication in *RIGNA*. (Pet. App. B at A8). The record reveals that Dean Walker did not single out *RIGNA* as "among the top dozen or so research journals in the accounting field." Instead, Dean Walker's comment referred to three journals – two of which were "A+" journals and, therefore, considered more prestigious than *RIGNA*. (App. 491-92). Accordingly, there is no substantive evidence that the University's characterization of *RIGNA* was so inconsistent as to allow a jury to reasonably infer that the reason the University denied Lawrence tenure is unworthy of belief.

Contrary to the view of the dissent below, there was no "eleventh-hour change" in what the requirements for tenure meant or how they were applied. Despite Lawrence's contention that she had been told she only was required to publish five or six articles in order to be awarded tenure, her first annual performance review explicitly identified this requirement to be "the apparent *minimum* research requirement today," and the tenure standards were explicit in warning Lawrence that meeting the minimum standards did not guarantee her an award of tenure. (App. 226, 241) (emphasis added). Consequently, holding Lawrence to a standard that required her to exceed the miminum requirements, according to the District Court, did not support a reasonable inference that the University's denial of tenure was pretextual. (Pet. App. C at A29).

Indeed, courts recognize that qualification for tenure is not the same as the standard for an award of tenure: "[m]ere qualification depends on objective measures – the

terminal degree, the number of publications, and so on," while an award of "[t]enure requires something more." *Namenwirth v. Board of Regents of the Univ. of Wisconsin Sys.*, 769 F.2d 1235, 1242 (7th Cir. 1985). For Lawrence, the "something more" required for an award of tenure also included evidence of top-quality research. From the time Lawrence first became employed by the University in a tenure-track position, she knew that she would need to provide evidence of quality research in order to be awarded tenure. The University's published tenure guidelines in effect at the time of her hire clearly stated that quality research – not quantity – would be a crucial element in her tenure decision. Further, Lawrence's annual performance evaluations, as early as three years before she applied for tenure, cited the importance of developing "quality publications" and the need to obtain "publication in top quality journals." (App. 244, 246).

Lawrence understood this. At the time of her tenure application, Lawrence had not published a single article in a top accounting journal. However, aware of the importance of publishing in the top-tier accounting journals, Lawrence identified four of the top accounting journals as target publications for work she had in progress at the time of her tenure application. Even more telling is Lawrence's admission in her rebuttal letter that publication in a top-ranked journal was a "valid goal," but one she had not yet attained – despite the two articles she had published in *RIGNA*. (App. 263). Deputy Chancellor Brady Deaton, who reviewed Lawrence's tenure application, also understood this requirement. Following his investigation, Deaton concluded that the quality of Lawrence's research record was not sufficient for promotion

and tenure. In defending the sufficiency of her evidence on pretext at the summary judgment stage, Lawrence cannot rely on only some of Deaton's statements regarding her qualification for tenure and ignore the uncontroverted statements made by Deaton which support the University's position. As *Reeves* reminds her, Lawrence must live with all of the undisputed facts in the record.

In determining that Lawrence had failed to offer sufficient facts from which a reasonable jury could infer that the University's denial of tenure was pretextual, the District Court also observed that Lawrence had failed to offer facts showing "that male applicants were granted tenure for meeting only the minimum requirements." (Pet. App. C at A29). It is undisputed that Khurana, Arunachalam, and Roberts all had at least one publication in a clearly-recognized, top-tier accounting journal and that they were judged by the disinterested outside reviewers and University decisionmakers on whether they had published in these top journals. Even the alleged inconsistency in how the co-authored articles were viewed in Lawrence's record as compared to Roberts' record does not suggest that the tenure standards were unequally applied to Lawrence; rather, the criticism by University decisionmakers of Lawrence's research record mirror the criticisms made by disinterested outside reviewers regarding Lawrence's record. In the end, a comparison of Lawrence's research record with the research records of similarly-situated male applicants led the District Court to conclude that there were sufficient facts in the record to support the determination reached by the University – that those applications were "worthy of tenure while Lawrence's was not." (Pet. App.

C at A31). Because Lawrence failed to bear her burden of proof on the issue of pretext, the Eighth Circuit properly affirmed the District Court's entry of summary judgment in favor of the University.

CONCLUSION

Lawrence has failed to demonstrate that her case presents any question which justifies its plenary review by this Court or remand to the Eighth Circuit for reconsideration. The decisions below present no conflict with this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 68 U.S.L.W. 4480 (June 12, 2000), and the Eighth Circuit and the District Court properly applied law consistent with *Reeves* and its precedent. Moreover, the Eighth Circuit and the District Court correctly decided that Lawrence had failed to offer sufficient evidence from which a jury could reasonably infer that the University's reason for denying her tenure was a pretext for gender discrimination.

For these reasons, Lawrence's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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